Supreme Court, U.S.
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No. 09-

IN THE

Supreme Court of the United States

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
Petitioner,

v.

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, contrary to the decisions of three other Circuits and this Court's precedents, the Federal Circuit erred in holding that the filing of a class action against the government does not toll the deadline for asserted class members to exhaust their administrative remedies.

CORPORATE DISCLOSURE STATEMENT

Arctic Slope Native Association, LTD. is a not for profit corporation organized under the laws of the State of Alaska, and controlled by the governing bodies of the Native Village of Atqasuk, the Native Village of Anaktuvuk Pass (Naqsragmiut), the Native Village of Barrow Inupiat Traditional Government, the Kaktovik Tribal Council, the Native Village of Nuiqsut, the Native Village of Point Hope, the Native Village of Point Lay, and the Village of Wainwright.

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KATHLEEN SEBELIUS,
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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Arctic Slope Native Association ("ASNA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The Federal Circuit opinion (Pet. App. 1a-26a) is reported at 583 F.3d 785. The Federal Circuit's Order denying ASNA's combined petition for rehearing and rehearing en banc (Pet. App. 41a-42a) is unreported. The opinion of the Civilian Board of Contract Appeals (Pet. App. 27a-40a) is reported at 08-2 B.C.A. (CCH) ¶ 33,923.

JURISDICTION

The court of appeals entered judgment on September 29, 2009. Pet. App. 2a. The court of appeals denied ASNA's combined petition for panel rehearing and rehearing en banc on March 10, 2010. Pet. App. 42a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 605 of Title 41 of the United States Code provides:

> Decision by Contracting Officer.
>
> (a) Contractor claims
>
> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. * * * Each claim by a contractor against the government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim. * * * .

INTRODUCTION

Sharply breaking from the law of three other Circuits, the Federal Circuit ruled that the filing of a class action against the government does not toll the deadline for asserted class members to exhaust their administrative remedies. *Compare* Pet. App. 12a-22a, *with Griffin* v. *Singletary*, 17 F.3d 356, 360-61 (11th Cir. 1994), *Andrews* v. *Orr*, 851 F.2d 146, 148-49 (6th Cir. 1988), *and McDonald* v. *Sec'y of Health & Human Servs.*, 834 F.2d 1085, 1091 (1st Cir. 1987). In creating this inter-circuit conflict, the Federal Circuit failed to honor (1) this Court's trilogy of cases holding that class action tolling extends to "'all asserted members'" of a proposed class, *see Crown,*

Cork & Seal Co. v. *Parker*, 462 U.S. 345, 353-54 (1983); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 176 n.13 (1974); and *American Pipe & Const. Co.* v. *Utah*, 414 U.S. 538, 554 (1974), (2) this Court's decisions holding that class action litigation and mandatory class action tolling are generally available against the government on the same basis as they are against private litigants, *see Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 & n.3 (1990); *Califano* v. *Yamasaki*, 442 U.S. 682, 700 (1979), and (3) the well-established axiom that "limitations principles should generally apply to the Government 'in the same way that' they apply to private parties," as "'a realistic assessment of legislative intent.'" *Franconia Assocs.* v. *United States*, 536 U.S. 129, 145 (2002). For these reasons, and because the Federal Circuit's decision would needlessly create burdensome, duplicative litigation, immediate review is warranted.

STATEMENT

1. In 1990 and 2001 two parallel class action lawsuits under the Contract Disputes Act, 41 U.S.C. §§ 601-613 (CDA), were commenced in New Mexico district court on behalf of tribal organizations that had contracted with two agencies of the federal government under the Indian Self-Determination and Education Assistance Act of 1975 (ISDA), 25 U.S.C. §§ 450-450n. *Ramah Navajo Chapter* v. *Lujan*, No. 90-0957 (D.N.M. filed Oct. 4, 1990); *Pueblo of Zuni* v. *United States*, No. 01-1046 (D.N.M. filed Sept. 10, 2001). Petitioner ASNA was an asserted member of both classes.

The 1990 *Ramah* lawsuit was filed against the Bureau of Indian Affairs (BIA) challenging the BIA's failure to pay "contract support costs" (CSCs) to tribal

contractors under the BIA's contracts, *see* 25 U.S.C. § 450j-1(a)(2), (g), the same type of contract costs this Court addressed in *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005). In 1993, the district court certified a class of "all Indian tribes and organizations who have contracted with the Secretary of the Interior under the [ISDA]," including Petitioner. J.A. 496. In so doing, the district court specifically ruled that "it is not necessary that each member of the proposed class exhaust its administrative remedies under the [CDA]" pursuant to 41 U.S.C. § 605(a) in order to be included in the class. J.A. 495. After a 1997 Tenth Circuit opinion on liability, two settlements with the class were approved totaling over $105 million. *Ramah Navajo Chapter* v. *Lujan*, 112 F.3d 1455 (10th Cir. 1997); *Ramah Navajo Chapter* v. *Babbitt*, 50 F. Supp. 2d 1091, 1109 (D.N.M. 1999) ($76 million partial settlement); *Ramah Navajo Chapter* v. *Norton*, 250 F. Supp. 2d 1303, 1317 (D.N.M. 2002) ($29 million partial settlement). Petitioner ASNA participated in both *Ramah* class settlements. *Ramah*, No. 90-0957 (Feb. 15, 2001) (unnumbered docket entry naming ASNA).

The 2001 *Zuni* lawsuit was filed against the Indian Health Service (IHS) for IHS's failure to pay CSCs to tribal contractors. As in *Ramah*, Petitioner was an asserted member of the *Zuni* class. J.A. 477 ("'all tribes and tribal organizations contracting with IHS under the ISDA between the years 1993 to the present'"). But unlike *Ramah*, class certification in *Zuni* ultimately was denied. Pet. App. 5a-6a. Thus, the asserted members of the *Zuni* class must now proceed through individual actions to adjudicate their claims against IHS.

This case arises from one such individual action, and concerns ASNA's 1996, 1997 and 1998 contracts

with IHS. ASNA alleges that as to each contract the Secretary failed to pay in full certain CSCs. This Court in *Cherokee Nation* held the government liable under standard government contract and appropriations law for failing to pay full CSCs to similarly situated contractors in two of the same contract years at issue here. 543 U.S. at 647.

2. In September 2005, while the class certification motion in *Zuni* was still pending, ASNA presented three claims to an IHS contracting officer covering the agency's 1996-1998 underpayments. J.A. 20-23, 25-28, 30-33. After the claims were deemed denied by inaction, the Civilian Board of Contract Appeals dismissed ASNA's ensuing appeals, concluding that under § 605(a) of the CDA the claims had been presented more than six years after they had accrued, and were thus outside § 605(a)'s six-year presentment limitations period. Pet. App. 36a-37a. ASNA claimed that the limitations period had been tolled by ASNA's inclusion in the asserted Zuni class, as well as on equitable grounds, but the Board rejected all tolling arguments. According to the Board, the six-year limitations provision in 25 U.S.C. § 605(a) was "jurisdiction[al]" and thus could not be tolled. Pet. App. 36a-37a.

3. The Federal Circuit affirmed in part and reversed in part. With respect to equitable tolling, the court of appeals held that the "'rebuttable presumption of equitable tolling'" applicable in suits against the United States applies to § 605(a). Pet. App. 22a (quoting *Irwin*, 498 U.S. at 95-96). Thus, on remand, the Board would have limited discretion to toll the limitations period on equitable grounds.

But the court reached a different conclusion with respect to mandatory class action tolling. The court of appeals recognized that, under Rule 23 of the

Federal Rules of Civil Procedure, a class action lawsuit automatically and categorically suspends the applicable statute of limitations as to "'*all* asserted members of the class who would have been parties had the suit been permitted to continue as a class action.'" Pet. App. 9a (quoting *American Pipe*, 414 U.S. at 554) (emphasis added). The court of appeals also cited *Crown*, where this Court explained that Rule 23 tolling applies not only to intervenors (the situation in *American Pipe*), but also to putative class members who institute their own suits after a court declines to certify the proposed class and the untolled limitations period expires. (In *Crown* the Court three times quoted *American Pipe*'s "all asserted members" language, *e.g.*, *Crown*, 462 U.S. at 349, 350, 353 adding "[o]nce the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Id.* at 353-54.)

The court of appeals acknowledged both the tolling doctrine and the Federal Circuit's recognition in *Stone Container Corp.* v. *United States*, 229 F.3d 1345 (Fed. Cir. 2000), that class action tolling under *American Pipe* and *Crown* applies as a matter of law in litigation against the government. Pet. App. 9a-10a; *see Stone Container*, 229 F.3d at 1354 ("Because '[a]ll laws in conflict with [the Federal Rules of Civil Procedure] shall be of no further force or effect after such rules have taken effect,' 28 U.S.C. § 2072(b), the Federal Rules of Civil Procedure, like the Federal Rules of Criminal Procedure, are 'as binding as any federal statute.' *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 255 (1988)."). *See also Califano*, 442 U.S. at 700 (since the Federal Rules of Civil Procedure "'govern the procedure in the United States district courts in *all* suits of a civil nature,'"

the Rule 23 class action rule applies to all government litigation "[i]n the absence of a direct expression by Congress" of a contrary intent).

As a result, the court of appeals determined that class action tolling does apply to § 605(a)'s six-year presentment requirement. Pet. App. 10a-12a. Indeed, based upon *Stone Container* the court *rejected* the government's argument that § 605(a) "is a 'jurisdictional statute [that is] not subject to judge-made class action tolling.'" Pet. App. 10a. The Court explained "[t]he case for statutory class action tolling is even stronger here than in *Stone Container* because tolling in this case is required by Rule 23." Pet. App. 11a; *see also id.* ("There is thus no need for section 605(a) to incorporate Rule 23 in order for Rule 23 to have binding legal effect.").

Nonetheless, after holding that mandatory class action tolling applies to § 605(a) in principle, the court of appeals concluded that such tolling does not apply to § 605(a) in practice. The reason the court gave is that § 605(a) imposes an exhaustion requirement and timely exhaustion is "jurisdiction[al]." Pet. App. 13a. Although exhaustion did not pose a barrier to discretionary equitable tolling, it precluded mandatory class tolling. This is so, the court said, because timely presentment "is a necessary predicate to the exercise of jurisdiction by a court or a board of contract appeals over a contract dispute governed by the CDA." *Id.*

Because this decision conflicts with the holdings of three circuit courts and the precedents of this Court, ASNA petitioned for en banc review. The petition was denied.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF EVERY CIRCUIT TO HAVE ADDRESSED THE ISSUE.

In holding that Rule 23 does not toll the time to pursue the administrative exhaustion process that precedes most government litigation, the Federal Circuit acted contrary to the decisions of the First, Sixth and Eleventh Circuits. In recognizing class action tolling, the Eleventh Circuit reasoned that "'[a]pplying the tolling rule to the filing of administrative claims will have the same salutary effect as exists for the filing of lawsuits. In both cases, tolling the statute of limitations during the pendency of a class action will avoid encouraging all putative class members to file separate claims with the EEOC.'" *Griffin* v. *Singletary*, 17 F.3d 356, 360 (11th Cir. 1994) (quoting *Sharpe* v. *Am. Express Co.*, 689 F. Supp. 294, 300 (S.D.N.Y. 1988)).

The First and Sixth Circuits reached the same conclusion. *Andrews* v. *Orr*, 851 F.2d 146, 148-49 (6th Cir. 1988) ("we agree with the district court that the thirty day limitations period for filing individual administrative complaints was tolled during the pendency of the earlier class actions"); *McDonald* v. *Sec'y of Health & Human Servs.*, 834 F.2d 1085, 1091-92 (1st Cir. 1987) (to same effect, concluding that under *American Pipe* and *Crown*, class members facing administrative limitations periods under the Social Security Act "go forward from the point where they had left off during pendency of the class action"); *see also id.* at 1092 ("While this case differs from *Crown Cork & Seal* and *American Pipe* in that the 60-day limitations periods pertained to administrative exhaustion, the principles discussed therein are generally applicable."). In fact, *no* court, other than

the panel below, has concluded that class action tolling does not apply to administrative exhaustion.

The Federal Circuit's attempt to distinguish the contrary First, Sixth and Eleventh Circuit cases is unavailing. According to the Federal Circuit, all of those cases were "predicated on" a footnote in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975), and thus are confined to Title VII litigation. Pet. App. 14a-15a. This is not true. For one thing, none of the other Circuits' cases even *cites Albemarle* (which, incidentally, never mentions tolling), much less is "predicated" upon it. And none of the other Circuit cases even remotely suggests that its tolling analysis or conclusion is unique to the Title VII context. Indeed, *McDonald* did not even involve Title VII claims; it concerned disability claims under 42 U.S.C. §§ 423(a)(1)(D) and 1382(a) of the Social Security Act. 834 F.2d at 1087.

The First, Sixth and Eleventh Circuits' decisions are all based upon the same broad, pragmatic concerns that informed this Court's interpretation of Rule 23 in *American Pipe* and *Crown*. Most notably, the availability of class action tolling "discourage[s] putative class members from needlessly multiplying actions without prejudicing defendants." *Griffin*, 17 F.3d at 361. By eliminating the need for each and every class member to file a separate action, class action tolling reduces the burden on parties, courts, and government agencies alike. Because the Federal Circuit's decision is in direct conflict with these holdings, certiorari is warranted.[1]

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[1] The Federal Circuit's opinion relies on a different line of cases, but those cases, unlike *Griffin*, *Andrews* and *McDonald*, did not involve tolling issues. In *Weinberger* v. *Salfi*, 422 U.S. 749, 764 (1975), for example, this Court held that judicial review

II. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT.

This Court made abundantly clear in *American Pipe*, *Crown* and *Eisen* that Rule 23 tolls the time for asserted members of a proposed class to take *any* action in pursuit of their individual claims pending disposition of the class certification motion. "[T]he commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *American Pipe*, 414 U.S. at 554. "Once the statute of limitations has been tolled, it remains tolled for all members of the putative class until class certification is denied." *Crown*, 462 U.S. at 354; *see also Eisen*, 417 U.S. at 176 n.13 (because "commencement of a class action tolls the applicable statute of limitations as to all members of the class," it also applies to members of a certified class who later opt-out).

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could not be had for class members who had failed to file claims and thus had received no decision from which review could be taken, but never discussed tolling the time to file such claims. In *Califano*, 442 U.S. at 703-04, this Court noted that a class definition would be too broad if it included members who had never sought a waiver or reconsideration of the Secretary's recoupment actions, but again never discussed tolling the time to take such actions. In *Mathews* v. *Eldridge*, 424 U.S. 319, 328 (1976), this Court held that the presentation of a benefits claim was not waivable in advance of a judicial review action, but again never discussed tolling the time to present. And in *Lunsford* v. *United States*, 570 F.2d 221 (8th Cir. 1977), the Eighth Circuit held that administrative exhaustion under the Federal Tort Claims Act (28 U.S.C. §§ 2671-2680) "cannot be waived," 570 F.2d at 224, and that administrative claims cannot be filed on a class basis, *id.* at 225, but never said a word about tolling the time to present such claims.

The rules are no different when the litigation is against the government. *See supra* at 6-7. Indeed, this Court in *Irwin* specifically held that Rule 23 tolling applies in government litigation to protect purported class members who are named in a "defective pleading during the statutory period," 498 U.S. at 96. *Irwin* cited *American Pipe* as one example where "plaintiff's timely filing of a defective class action tolled the limitations period as to the individual claims of purported class members." *Id.* at 96 n.3. Thus, under this Court's decisions, Rule 23 class action tolling applies against the government to protect "*all* asserted members" of an unsuccessful (or "defective") class action. *American Pipe*, 414 U.S. at 554 (emphasis added). *See also Franconia*, 536 U.S. at 145 (addressing limitations principles generally).

"All" means "all;" it does not mean "some." As in *Crown*, it does not mean just "intervenors," 462 U.S. at 350, and it does not mean just putative members who received right-to-sue letters before the class action was filed. *Id.* at 354. And, contrary to the Federal Circuit's view of the word, "all" does not mean just those putative class members who presented administrative claims before the class action was filed. *See also McDonald*, 834 F.2d at 1091 (tolling applies to asserted members of "even a meritless class action").

The court of appeals recognized that § 605(a)'s exhaustion requirement was not actually "'jurisdictional,'" Pet. App. 10a, 12a, but nonetheless denied tolling on the rationale that the district court in *Zuni* could not exercise jurisdiction over claims that had not yet been presented. But the issue is not whether the district court had jurisdiction over claimants who had not yet exhausted their claims, any more than it is ever the question in class action litigation whether

a district court has jurisdiction over the asserted absent class members of an as-yet uncertified class. Rather, the proper question—regardless of whether the class members will ultimately be a part of the class, or whether a class will even be certified—is whether Rule 23 tolls the time for those asserted class members to take individual action in pursuit of their individual claims while the district court decides how to proceed. The Federal Circuit's failure to make this distinction, with immediate implications for all former *Zuni* claimants and long-term implications for all class litigation against the government, warrants immediate review.

III. THE DECISION BELOW IS WRONG, WILL NEEDLESSLY MULTIPLY LITIGATION, AND ATTRIBUTES TO CONGRESS AN IRRATIONAL INTENT.

The Federal Circuit's application of the *American Pipe* rule is fatally flawed. Specifically, in determining whether Petitioner would have been a party "'had the [*Zuni*] suit been permitted to continue as a class action,'" Pet. App. 9a, the court did not consider the "class" as defined in the Complaint—which on its face included ASNA—but instead redefined the class long after the litigation commenced to *exclude* ASNA. That retroactive analysis is wrong, unduly burdensome, and illogical. It is wrong because, until a court rules otherwise on the class certification motion, the putative class is defined by the Complaint and, as an asserted member of that class, ASNA and every other asserted class member are entitled to the benefit of tolling.

It also fosters unnecessary litigation and uncertainty, and is thus burdensome and inefficient. Worse yet, to the extent it applies to administrative exhaustion, it severely narrows the availability of

class action tolling in litigation against the government, contrary to this Court's decision in *Califano*. Since most suits against the government require some sort of administrative exhaustion, excepting exhaustion from the tolling rule effectively compels all asserted class members in government litigation to take individual protective actions to exhaust their administrative remedies—even after a class action complaint is filed—defeating the very purpose of Rule 23.

Moreover, there is no logic to the Federal Circuit's holding that a so-called "jurisdictional" exhaustion requirement must give way to discretionary judge-made equitable tolling, but not to mandatory class action tolling. All tolling—both discretionary and mandatory—is a question of legislative intent. *See Irwin*, 498 U.S. at 95 ("a realistic assessment of legislative intent"); *American Pipe*, 414 U.S. at 557-58 ("consonant with the legislative scheme"). And it simply makes no sense to conclude that Congress would intend to permit *ad hoc* equitable tolling but not sensible and predictable class action tolling. Certainly there is nothing to suggest that Congress had such an internally inconsistent intent when it added the six-year presentment rule to the Contract Disputes Act. Indeed, the controlling presumption in favor of Rule 23 tolling is quite to the contrary in the absence of "the necessary clear expression of congressional intent to exempt actions brought under that statute from the operation of the Federal Rules of Civil Procedure." *Califano*, 442 U.S. at 700.

Finally, the Federal Circuit's decision to remand this case for application of equitable tolling is no reason to delay review. As this Court has made clear, "there is no absolute bar to review of nonfinal judgments." *Mazurek* v. *Armstrong*, 520 U.S. 968,

975-76 (1997) (per curiam); *see, e.g.*, *Breuer* v. *Jim's Concrete of Brevard, Inc.*, 538 U.S. 691, 694 (2003) (reviewing court of appeals' order affirming denial of motion to remand case to state court). This Court has intervened "particularly [when] the lower court's decision is patently incorrect" and the decision "will have immediate consequences for the petitioner." Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 281 (9th ed. 2007). Both of those conditions are met here. The Federal Circuit's decision cannot be squared with this Court's decisions or the decisions of three other circuits. *See supra* at 8-12; *cf. Breuer*, 538 U.S. at 694 (reviewing nonfinal order to resolve circuit split). And the fundamental error in the court of appeals' analysis—permitting only equitable tolling and not class action tolling—will have "immediate consequences" by requiring burdensome, time-consuming, case-by-case, fact-intensive litigation on an individual claimant's particular claim to discretionary tolling. That burden falls not just on Petitioner ASNA, but on every single tribe that is owed CSCs under this Court's decision in *Cherokee*. The Federal Circuit's legal error is plain, the circuit split is clear, and this Court's review is therefore necessary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 26, 2010

APPENDIX A

UNITED STATES COURT OF APPEALS,
FEDERAL CIRCUIT.

Nos. 2008-1532

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
Appellant,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellee.

Appeal from the Civilian Board of Contract Appeals in case nos. 190-ISDA and 289-ISDA through 293-ISDA, Administrative Judge Candida S. Steel

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2008-1607, 2009-1004

CONFEDERATED TRIBES OF COOS, LOWER UMPQUA, AND SIUSLAW INDIANS,
Appellant,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellee.

METLAKATLA INDIAN COMMUNITY,
Appellant,

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellee.

Appeals from the Civilian Board of Contract Appeals in case nos. 235-ISDA, 236-ISDA, 280-ISDA and 281-ISDA, Administrative Judge Candida S. Steel

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DECIDED: September 29, 2009

Before MAYER, LOURIE, and BRYSON, *Circuit Judges.*

BRYSON, *Circuit Judge.*

The appellants in these three appeals are Indian tribes and tribal organizations that provide health care services to their members under contracts with the Indian Health Service ("IHS"). The contracts were entered into pursuant to the Indian Self-Determination and Education Assistance Act ("ISDA"), 25 U.S.C. §§ 450-450n. The Civilian Board of Contract Appeals dismissed several of the appellants' contract claims against the IHS on the ground that the appellants had failed to present those claims to a contracting officer within six years after the claims accrued, as required by section 605(a) the Contract Disputes Act ("CDA"), 41 U.S.C. § 605(a).

Before the Board of Contract Appeals, the appellants argued that the CDA's six-year presentment period was tolled on either of two grounds. First, they argued that the statutory presentment period was subject to equitable tolling. Second, they argued that the period was legally tolled by the pendency of two class action lawsuits in which they were putative class members. The Board rejected both arguments. It held that the CDA's presentment period is a jurisdictional requirement that is not subject to tolling, either equitable or legal. We hold that the six-year presentment period is subject to equitable

tolling, but not class action tolling; we remand to the Board to determine whether this case satisfies the requirements of the equitable tolling doctrine.

I

The ISDA was enacted in 1975 to promote tribal autonomy by permitting Indian tribes to manage federally funded services that were previously administered by the federal government. *See* 25 U.S.C. § 450a; *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631, 634 (2005). Transfers of federal programs to tribal control under the ISDA are accomplished through "self-determination contracts" under which a tribe agrees to take over administration of a federal program such as an IHS hospital or clinic. 25 U.S.C. § 450f(a). The government is required to provide self-determination contractors with the same amount of funding that would have been appropriated for the tribal programs if the government had continued to operate the programs directly. *Id.* § 450j-1(a)(1).

As originally enacted, the ISDA did not require the government to pay the administrative costs that the tribes incurred to operate the programs. In many cases, contractors were forced to absorb those costs, thereby reducing the funds available for the tribes to provide direct services to their members. *See Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075, 1080 (Fed. Cir. 2003); S. Rep. No. 100-274, at 8-9 (1987), U.S. Code Cong. & Admin. News 1988, p. 2620. To remedy that problem, Congress amended the ISDA in 1988 to require the federal government to provide funds to pay the administrative expenses of covered programs. Those expenses included "contract support costs," defined in the statute as costs that a federal agency would not have directly incurred, but that tribal organizations acting as contractors rea-

sonably incur in managing the programs. 25 U.S.C. § 450j-1(a)(2).

The 1988 amendments to the ISDA made the Contract Disputes Act applicable to disputes concerning self-determination contracts. 25 U.S.C. § 450m-1(d). As a result, ISDA self-determination contractors can appeal an adverse decision by a contracting officer on contract disputes to the Civilian Board of Contract Appeals, *see* 41 U.S.C. § 606, or to the Court of Federal Claims, *see* 41 U.S.C. § 609(a)(1). In addition, the ISDA permits contractors to bring claims in district courts, an avenue of relief that is generally unavailable to government contractors under the CDA. *See* 25 U.S.C. § 450m-1(a).

After the 1988 amendments took effect, some ISDA contractors claimed that the government was still failing to meet its obligation to fully fund the contract support costs. Those allegations resulted in the filing of several class action lawsuits, two of which are pertinent to the cases before us. In the first of those suits, the Cherokee Nation of Oklahoma filed a complaint and a request for class certification on March 5, 1999, in the United States District Court for the Eastern District of Oklahoma. The plaintiffs alleged that they had entered into contracts with the IHS to provide tribal health care services, but that the government had refused to pay the full amount of the promised support costs because Congress had failed to appropriate sufficient funds to cover those costs. The complaint sought certification of a class comprising "[a]ll Indian tribes and tribal organizations operating IHS programs under [ISDA contracts] that were not fully paid their contract support costs needs, as determined by IHS, at any time between 1988 and

the present." *Cherokee Nation of Okla. v. United States*, 199 F.R.D. 357, 360 (E.D. Okla. 2001).

On February 9, 2001, the district court denied class certification. The court subsequently ruled on the merits that the government was not obligated to provide contract support costs in excess of the amount appropriated by Congress for that purpose, *Cherokee Nation of Okla. v. United States*, 190 F. Supp. 2d 1248, 1259 (E.D. Okla. 2001), and the Tenth Circuit affirmed, *Cherokee Nation of Okla. v. Thompson*, 311 F.3d 1054, 1063 (10th Cir. 2002). After this court reached the opposite conclusion in another ISDA case, *Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075 (Fed. Cir. 2003), the Supreme Court granted certiorari to resolve the conflict. The Court subsequently held that the government could not avoid its contractual obligation to pay support costs to the plaintiff ISDA contractors on the ground that Congress had appropriated insufficient funds specifically designed to cover those costs, and that the government had to satisfy its contractual obligations out of other unrestricted appropriated funds. *Cherokee Nation of Okla. v. Leavitt*, 543 U.S. 631 (2005).

In the second lawsuit, the Pueblo of Zuni filed a class action on September 10, 2001, in the United States District Court for the District of New Mexico, similarly contending that the government had failed to pay full support costs to contractors who were providing tribal health services pursuant to ISDA contracts with the IHS. The asserted class consisted of "all tribes and tribal organizations contracting with IHS under the ISDA between the years 1993 to the present." *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1105 (D.N.M. 2006). That action was stayed pending the outcome of the *Cherokee Nation*

litigation that was then on appeal to the Tenth Circuit. After the Supreme Court issued its *Cherokee Nation* decision, the stay in the *Zuni* case was lifted, and on May 22, 2007, the district court denied certification of the class. *Pueblo of Zuni v. United States*, 243 F.R.D. 436, 453 (D.N.M. 2007).

II

The Arctic Slope Native Association, Ltd. ("ASNA"), operates a federal hospital under an ISDA contract with the IHS. ASNA claims to have been a member of the putative class in the *Zuni* litigation. On September 30, 2005, after the Supreme Court's decision in the *Cherokee Nation* case and while the *Zuni* class action was still pending, ASNA filed CDA claims with an IHS contracting officer alleging that the IHS had failed to pay the full amount of the contract support costs that ANSA had incurred to operate the hospital during fiscal years 1996 through 2000.

The Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians ("Confederated Tribes") and the Metlakatla Indian Community also provide Indian health services pursuant to self-determination contracts with the IHS. They claim to have been members of the putative class in the *Cherokee Nation* action that was initiated in the Eastern District of Oklahoma. The Confederated Tribes filed claims with an IHS contracting officer on December 29, 2003, and September 27, 2004, seeking contract support costs for fiscal years 1995 through 1998; the Metlakatla Indian Community filed its claims with the an IHS contracting officer on June 30, 2005, seeking contract support costs for fiscal years 1995 through 1999.

The IHS contracting officers denied one claim and failed to act on the remaining claims, as a result of which those claims were deemed denied. *See* 41 U.S.C. § 605(c)(5). Each appellant then timely appealed to the Board of Contract Appeals. On July 28, 2008, the Board issued decisions in all three cases, holding that it lacked subject matter jurisdiction to consider those claims that the contractors had failed to submit to the contracting officers within six years of accrual, as mandated by the CDA. *See* 41 U.S.C. § 605(a).

Before the Board of Contract Appeals, the appellants argued that because they were members of the putative classes in either the *Cherokee Nation* or *Zuni* class actions, the six-year period for filing their administrative claims under section 605(a) of the CDA was legally tolled until class certification was denied in those cases. *See American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). The appellants also argued that the six-year period should have been extended in light of equitable considerations. The Board, however, ruled in each of the three cases that the six-year period was not subject to either legal or equitable tolling. Section 605(a), the Board explained, "does not contain a statute of limitations which imposes a time limit for filing suit. Rather, it imposes a time limit which this Board's precedent establishes is a prerequisite to our jurisdiction." The Board therefore dismissed all of the claims at issue in these appeals for lack of jurisdiction.

III

Section 605(a) of the CDA provides as follows, in pertinent part:

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer

> for a decision. . . . Each claim by a contractor against the government relating to a contract . . . shall be submitted within 6 years after the accrual of the claim.

41 U.S.C. § 605(a). The statute further provides that the contracting officer's decision on the claim "shall be final and conclusive" unless review is sought by one of the specifically authorized means. *Id.* § 605(b). Section 606 of the CDA authorizes a contractor to appeal the decision of a contracting officer to an agency board of contract appeals within 90 days of the contractor's receipt of the decision. Section 609 of the Act gives the contractor the alternative of appealing the decision of the contracting officer to the Court of Federal Claims if the appeal is filed within 12 months of the receipt of the decision. The ISDA provides a third mechanism for review of decisions on contract claims, giving United States district courts jurisdiction over any claim for money damages arising under contracts authorized by the Act, subject to the proviso that the CDA shall apply to the resolution of disputes concerning self-determination contracts. 25 U.S.C. § 450m-1(a), (d).

The government takes the position that, by virtue of the ISDA's incorporation of CDA procedures, the temporal scope of the waiver of sovereign immunity for the submission of ISDA administrative claims is six years, and that any claim not submitted to a contracting officer within that time period is jurisdictionally barred from further review, administrative or judicial. The appellants, on the other hand, assert that the six-year presentment period in section 605(a) can be equitably or legally tolled without exceeding the limits on the government's waiver of sovereign immunity. For the reasons set forth below,

we hold that the six-year time limit for filing a claim with a contracting officer is not subject to statutory class action tolling in this case. However, we conclude that the six-year time period is subject to equitable tolling.

A

In *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), the Supreme Court adopted the principle of "class action tolling." The Court noted that under the Federal Rules of Civil Procedure, a class action complaint effectively begins the lawsuit and stops the running of the statute of limitations for all class members with respect to the asserted cause of action. Because it is unknowable at the time a class action is filed whether the class will be certified, the Court held that even when the district court denies class certification, the statute of limitations is suspended during the pendency of the class action proceedings. The Court held that the benefit of that suspension accrues not only to the named parties, but also to "all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.; see also Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983).

In *Stone Container Corp. v. United States*, this court explained that the Supreme Court's decisions in *American Pipe* and *Crown, Cork & Seal* "were not based on judge-made equitable tolling, but rather on the Court's interpretation of Rule 23 [of the Federal Rules of Civil Procedure]," which governs class actions in federal district courts. 229 F.3d 1345, 1354 (Fed. Cir. 2000). Rule 23 is designed to avoid the "unnecessary filing of repetitious papers and motions" and to promote economy of litigation. *American Pipe*, 414 U.S. at 550, 553. If the commencement of a class

action did not toll the statute of limitations for putative class members, each class member would be required to file a separate action prior to the expiration of that class member's own limitations period. The result, the Supreme Court has explained, "would be a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 and the tolling rule of *American* Pipe were designed to avoid." *Crown, Cork & Seal*, 462 U.S. at 351.

The government contends that because the six-year time limit in section 605(a) is a condition on the waiver of sovereign immunity, it is a "jurisdictional statute [that is] not subject to judge-made class action tolling." Our decision in *Stone Container*, however, closes the door on that argument. In that case, we addressed the question whether Rule 23 of the Court of International Trade, which corresponds to Rule 23 of the Federal Rules of Civil Procedure, tolls the two-year statute of limitations on actions brought in that court pursuant to 28 U.S.C. § 1581. *See* 28 U.S.C. § 2636(i). Based on Congress's pronouncement that "[a]ll laws in conflict with [the Federal Rules of Civil Procedure] shall be of no further force or effect after such rules have taken effect," 28 U.S.C. § 2072(b), we concluded that Rule 23 is "as binding as any federal statute." *Stone Container,* 229 F.3d at 1354, quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988). We went on to explain that because Rule 23 "is statutory rather than equitable, it follows that the rule of *American Pipe* applies to the government just as it does to private parties." *Id.* The government's contentions that class action tolling cannot apply to a temporal limitation on actions against the government, and that class action tolling is "judge-made" rather than statutory, therefore have no force in light of *Stone Container*.

The government's attempts to distinguish *Stone Container* are unavailing. Noting that the Civilian Board of Contract Appeals, unlike the Court of International Trade, does not have a class action provision corresponding to Rule 23 of the Federal Rules of Civil Procedure, the government suggests that for that reason class action tolling does not apply to claims before the Board. The government, however, has it backwards. The statutory authority for tolling the limitations period for a claim derives from the rule that provides the tolling, not from the rules of the court or board in which the tolling is asserted. Because the *Zuni* and *Cherokee Nation* class actions were brought in federal district court, the governing legal rule is Rule 23. The case for statutory class action tolling is even stronger here than in *Stone Container* because tolling in this case is required by Rule 23 and does not depend on a non-statutory court rule such as the class action rule of the Court of International Trade.

There is likewise no force to the government's reliance on our statement in *Stone Container* that the statute of limitations in the Court of International Trade specifically incorporates the rules of that court. The government suggests that Rule 23 tolling before the Board is "not 'legal' tolling" because section 605(a) does not similarly confer statutory authority on the Board's rules. But, again, the governing rule here is Rule 23, not the rules of the Board. In *Stone Container*, it was important that the governing statute of limitations expressly incorporated the rules of the Court of International Trade because that court's rules, standing alone, are not statutory. Rule 23, however, is statutory. There is thus no need for section 605(a) to incorporate Rule 23 in order for Rule 23 to have binding legal effect.

Finally, the government asserts that because *Stone Container* "did not involve a jurisdictional statute of limitations," that decision does not support the application of class action tolling to CDA claims. The limitations statute at issue in *Stone Container*, however, constituted a waiver of sovereign immunity and thus defined the court's jurisdiction. *See Stone Container*, 229 F.3d at 1352; *see also Martinez v. United States*, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (en banc). Nonetheless, this court held that the statute in question, 28 U.S.C. § 2636(i), did not bar the application of class action tolling. Nothing in the language of section 2636(i) suggests that it is more amenable to tolling than section 605(a). Section 605(a) provides that a CDA claim against the government "shall be submitted within 6 years after the accrual of the claim." Section 2636(i) states that an action brought against the government in the Court of International Trade "is barred unless commenced . . . within two years after the cause of action first accrues." If anything, the "is barred" language of section 2636(i) is even more preclusive than the "shall be submitted" language of section 605(a). We therefore reject the government's sweeping contention that any time limitation, such as the limitation in section 605(a), which defines the matters that a board or court may adjudicate, is not subject to class action tolling because that provision is "jurisdictional" in nature.

B

There is more force to the government's alternative, and narrower, argument that the appellants are not entitled to the benefit of class action tolling because their failure to present the disputed claims to a contracting officer within the six-year period provided in section 605(a) meant that they did not qualify as

potential members of the plaintiff class with respect to those claims.

The six-year presentment period is part of the requirement in section 605(a) that all claims by a contractor against the government be submitted to the contracting officer for a decision. This court has held that the presentment of claims to a contracting officer under section 605(a) is a prerequisite to suit in the Court of Federal Claims or review by a board of contract appeals. *England v. Swanson Group*, 353 F.3d 1375, 1379 (Fed. Cir. 2004); *Sharman Co. v. United States*, 2 F.3d 1564, 1568 (Fed. Cir. 1993). Statutory time restrictions on the submission of administrative claims are a part of the requirement that a party must satisfy to properly exhaust administrative remedies. *See Woodford v. Ngo*, 548 U.S. 81, 90 (2006) ("Proper exhaustion demands compliance with an agency's deadlines and other critical procedural rules."). Therefore, subject to any applicable tolling of the statutory time period, the timely submission of a claim to a contracting officer is a necessary predicate to the exercise of jurisdiction by a court or a board of contract appeals over a contract dispute governed by the CDA.

The Confederated Tribes and the Metlakatla Indian Community did not present their claims to an IHS contracting officer for 1995-98 and 1995-99, respectively, until after class certification was denied in the *Cherokee Nation* action, more than six years after those claims accrued. ASNA presented its claims to the contracting officer during the pendency of the *Zuni* class action, but it did not do so until 2005, more than six years after its causes of action had accrued for 1995-99. The government contends that the appellants' failure to present their claims to

contracting officers within six years of accrual means that those claims could not have been litigated in the *Zuni* and *Cherokee Nation* class actions even if those suits had been permitted to continue. Consequently, the government argues, the class action tolling rule does not apply to the appellants' claims.

The appellants argue that they are entitled to the benefits of the class action tolling rule despite their not having timely presented the disputed claims to contracting officers. They rely on a line of cases in which courts have held, in actions brought under Title VII of the Civil Rights Act of 1964, that an individual claimant need not exhaust administrative remedies to obtain a backpay award in a class action lawsuit, *see Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975), and that the filing of a class action complaint therefore tolls the applicable statute of limitations as to all asserted members of the class who would have been parties if the suit had been permitted to continue as a class action, *see Griffin v. Singletary*, 17 F.3d 356, 360-61 (11th Cir. 1994); *Andrews v. Orr*, 851 F.2d 146, 149 (6th Cir. 1988); *Sharpe v. Am. Express Co.*, 689 F. Supp. 294 (S.D.N.Y. 1988); *see also Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 n.6 (1979) (same rule applicable in representative actions under the Age Discrimination in Employment Act).

That line of cases is inapplicable here, however, because it is predicated on the Supreme Court's holding, in the *Albemarle Paper Co.* case, that Title VII permits an individual to be a class member and receive a backpay award in a class action suit even though that individual has not exhausted applicable administrative remedies under the Act. *See also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398

(1982). As the Supreme Court has made clear, that principle derives from the specific language and legislative history of Title VII. *See Albemarle Paper Co.*, 422 U.S. at 414 n.8.

Under other statutes, both the Supreme Court and the lower courts have held that a party that has not exhausted administrative remedies is not eligible to be a class member. For example, in cases involving classwide challenges to decisions by the Social Security Administration pursuant to section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), the Supreme Court has held that asserted class members who were not alleged to have filed a timely administrative application for relief are not eligible to be members of the class and that the district court was "without jurisdiction over so much of the complaint as concerns the class." *Weinberger v. Salfi*, 422 U.S. 749, 763-64 (1975); *see also Califano v. Yamasaki*, 442 U.S. 682, 703-04 (1979) (class certification that included claimants who failed to file administrative claim for relief was "plainly too broad"); *Mathews v. Eldridge*, 424 U.S. 319 (1976) ("requirement that a claim for benefits shall have been presented to the Secretary" is nonwaivable and jurisdictional).[1]

Similarly, in class actions brought under the Federal Tort Claims Act ("FTCA"), the courts have uniformly held that a district court does not have jurisdiction

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[1] The plaintiffs rely on *McDonald v. Sec'y of Health & Human Servs.*, 834 F.2d 1085 (1st Cir. 1987), in which the First Circuit allowed class action tolling in a class action under the Social Security Act, but that decision is not helpful to them. The court was careful to note that in that case all class members had satisfied the requirement of presenting a claim of benefits to the Secretary, and for that reason the district court had the authority to grant relief to those class members. *Id.* at 1092 n.4.

over asserted class members who have not complied with the FTCA's administrative claim presentment requirements, and that the court lacks power to include those parties in the certified class. *See In re "Agent Orange" Prod. Liability Litig.*, 818 F.2d 194, 198 (2d Cir. 1987); *Lunsford v. United States*, 570 F.2d 221, 224-27 (8th Cir. 1977); *Commonwealth of Pa. v. Nat'l Ass'n of Flood Insurers*, 520 F.2d 11, 23 (3d Cir. 1975). The court in the *Lunsford* case distinguished the different rule applied in actions under Title VII, noting that unlike actions under Title VII, suits under the FTCA are not "inherently class actions," and that the administrative agency in FTCA cases is given broad authority to settle cases, while the EEOC, the administrative agency to which administrative claims are submitted under Title VII, has only the authority to conciliate, not the authority to settle claims. In light of those distinctions, the instant cases are much more akin to the FTCA cases than to the Title VII cases: Contract disputes are not "inherently class actions," even though there may be legal issues in contract cases that are common to multiple contractors and multiple claims, and the agencies to which claims are presented under the CDA have broad settlement authority, not merely the power to conciliate.[2]

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[2] The FTCA cases cannot be distinguished from this case on the ground that the presentment requirement under section 605(a) is not as rigid as the presentment requirement in the FTCA; to the contrary, although the presentment requirement in the FTCA, like the presentment requirement in section 605(a), is frequently referred to as "jurisdictional," a majority of the courts of appeals have held that it is nonetheless subject to equitable tolling in appropriate cases. *See T.L. ex rel. Ingram v. United States*, 443 F.3d 956, 961 (8th Cir. 2006) ("[C]onsiderations of equitable tolling simply make up part of

Finally, the Court of International Trade has held that the court lacks the authority under 28 U.S.C. § 1581(a) to exercise jurisdiction over asserted class members who have failed to complete the required administrative protest process under section 515 of the Tariff Act of 1930. *Nu-Farm America's, Inc. v. United States*, 398 F. Supp. 2d 1338, 1352-53 (Ct. Int'l Trade 2005). The court explained that the rationale of class action tolling—that the filing of the class action complaint ends the running of the statute of limitations as to all putative class members—does not apply to parties over whom the court has no authority to exercise jurisdiction, even if those parties' claims resemble the claims of the class members. For that reason, the court held that class action tolling is not available to a party who, because of failure to comply with a mandatory requirement to exhaust administrative remedies, could not be a class member if the class were certified. *Id.* at 1353-54.

In light of those authorities, the key question in determining whether class action tolling applies to this case is whether, with respect to the claims here in dispute, those parties who failed to make a timely presentment of their claims to a contracting officer would have been eligible to be class members if the *People* [sic] *of Zuni* and *Cherokee Nation* cases had continued as class actions. We conclude that they would not. The courts that have addressed the

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the court's determination whether an action falls within the scope of the waiver of sovereign immunity granted by Congress, and thus within the jurisdiction of the federal courts."); *see also Santos ex rel. Beato v. United States*, 559 F.3d 189, 194-95 (3d Cir. 2009); *Ramirez-Carlo v. United States*, 496 F.3d 41, 49 (1st Cir. 2007); *Glarner v. U.S. Dep't of Veterans Admin.*, 30 F.3d 697 (6th Cir. 1994); *contra Marley v. United States*, 567 F.3d 1030 (9th Cir. 2009).

question have held that an ISDA claimant that has not presented its claim to a contracting officer pursuant to the CDA cannot be a class member in an ISDA class action. *See Menominee Indian Tribe of Wis. v. United States*, 539 F. Supp. 2d 152 (D.D.C. 2008); *Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099, 1113-14 (D.N.M. 2006); *Ramah Navajo Sch. Bd., Inc. v. United States*, 83 Fed. Cl. 786 (2008).[3] Those decisions are consistent with the decisions cited above, holding that a party's failure to exhaust mandatory administrative remedies bars the court from treating that party as a class member. In that setting, class action tolling does not apply because the party that failed to comply with the statutory requirement to present its claims to a contracting officer would not have satisfied the requirement, set forth in *American Pipe*, making class action tolling available "to all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." 414 U.S. at 554.

Class action tolling is unavailable in this situation for another reason as well. Part of the rationale underlying class action tolling is that putative class members should be treated the same as actual parties to the litigation. *See American Pipe*, 414 U.S.

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[3] The plaintiffs rely on an unpublished decision of the district court in *Ramah Navajo Chapter v. Lujan*, No. Civ 90-0957 (D.N.M. Oct. 1, 1993), as standing for the opposite proposition, but the court in that case did not adopt the general principle that asserted class members need not exhaust their administrative remedies in an ISDA contract case. Instead, the court held that exhaustion of administrative remedies was not required under the circumstances of that case because it would have been futile. The appellants have not argued that any "futility" exception excuses their failure to make timely presentments of the disputed claims to the contracting officers.

at 551 ("the claimed members of the class stood as parties to the suit until and unless they received notice and chose not to continue"). Yet to hold that the plaintiffs are entitled to tolling in this case based on their status as asserted class members would put them in a better position than they would have been in if they had actually been named parties in the *Zuni* and *Cherokee Nation* actions. If they had directly joined or intervened in those actions without previously presenting their claims to a contracting officer, those claims would have been subject to dismissal for failure to comply with the presentment requirement of section 605(a). Nor would the filing and pendency of their action in the district court have tolled the six-year presentment period. *See Garrett v. United States*, 640 F.2d 24, 26 (6th Cir. 1981) (FTCA presentment period not tolled by premature filing of civil action); *Denton v. United States*, 638 F.2d 1218, 1221 n.5 (9th Cir. 1981) (same); *Miller v. United States*, 418 F. Supp. 373, 378 (D. Minn. 1976).[4] Thus, if the six-year presentment period had lapsed while the two actions were pending, the plaintiffs' claims would be lost. Given that outcome in the hypothetical situation in which the plaintiffs directly participated in the two actions, it would make no sense to hold that they would be better off with respect to tolling rights if their participation in the two actions were limited to the status of asserted class members.

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[4] Recognizing that non-tolling in such cases is the ordinary rule, Congress in 1988 amended the FTCA to allow for tolling in certain cases—where the United States is substituted as the party defendant and the action is dismissed for failure first to present an administrative claim. *See* 28 U.S.C. § 2679(d)(5). No statutory provision under the CDA or the ISDA allows for tolling of the presentment period when a premature action is filed before the Board or a court.

The plaintiffs argue that not allowing class action tolling in this situation would have the effect of making class actions unavailable in contract cases under the ISDA. As ASNA puts it, adopting that rule would "guarantee[] that no class action can *ever* exist in contract litigation" arising under the Act. That is plainly an overstatement, as it conflates the requirement of timely presentment to a contracting officer with the subsequent challenge to a contracting officer's adverse decision before a court or board. Requiring each potential class member to exhaust administrative remedies with respect to all claims that are subject to classwide relief is not the same as requiring that the potential class member take the further, and burdensome, step of individually challenging each contracting officer decision before a court or board. Once a party has submitted a timely claim to a contracting officer and the contracting officer has rejected the claim, either expressly or by failing to act on it in the statutorily prescribed period, the claimant would be eligible to benefit from classwide relief and would presumably be entitled to class action tolling with regard to the time limitations on any subsequent, individual challenge to the contracting officer's decision.

There is also no force to the plaintiffs' argument that the effect of rejecting class action tolling in these cases would be that tolling would be available only when a class is certified, which is precisely when tolling for individual actions is unnecessary. That argument overlooks the main point of class action tolling, which is to provide protection against the running of the statute of limitations for parties who could potentially be included as class members in a class action, but who are ultimately left outside the class, by a court's decision not to certify the class or

to certify a narrow class that does not include them. *See American Pipe*, 414 U.S. at 553-54. That rationale would protect any potential class member over whom the court could exercise jurisdiction by class certification, but not parties, such as those who have failed to exhaust mandatory administrative remedies, over whom the court may not exercise jurisdiction.

It is true that the rule we adopt would require parties to devote resources to the submission of claims to contracting officers prior to the classwide resolution of the legal issues in the case, and that under the contrary rule advocated by the plaintiffs such an expenditure of resources would ultimately be necessary only if the plaintiffs prevailed on their legal argument in the class action court. As the claim letters in the record in this case show, however, such submissions to the contracting officer need not be elaborate. Moreover, where, as here, the various parties' claims all depend on a single legal theory—which will normally be the case when those claims are amenable to class action treatment—little separate effort will have to be devoted to each claim apart from identifying the amount of the claim. At the same time, the submissions serve the useful function of apprising the government of the amount that is potentially at issue in the class action suit, which promotes the notice function that is part of the justification for the presentment requirement in the first place. We therefore do not detect any compelling policy justification for extending the rule of class action tolling to this case; instead, we follow the principle set forth in the cases cited above and hold that class action tolling is not available to parties such as the plaintiffs in these cases, who have not made a

timely presentation of their claims to a contracting officer.[5]

C

In the alternative, the plaintiffs contend that they are entitled to suspension of the six-year limitations period of section 605(a) under the doctrine of equitable tolling. We agree with the plaintiffs that equitable tolling applies to that six-year time limitation, and we remand for the Board to determine whether, on the facts of these cases, the appellants have established their entitlement to suspension of the limitations period.

The appellants first argue that the CDA's six-year presentment period is subject to equitable tolling under the principle articulated by the Supreme Court in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). In that case, which involved an employment discrimination action against the federal government, the Court held that, as a general rule, "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." 498 U.S. at 95-96. The key question under *Irwin* is whether "there [is] a good reason to believe that Congress did *not* want the equitable tolling doctrine

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[5] There is no merit to the plaintiffs' argument that the Board erred in relying on the definition of the term "claim" in the Federal Acquisition Regulation ("FAR") rather than looking to the ISDA regulations. The Board's decision was not based on the plaintiffs' having filed something that did not qualify as a "claim" under the FAR but would have qualified as a "claim" under the ISDA regulations. The problem is that the plaintiffs filed nothing with the contracting officers within the six years of accrual of the claims at issue that could qualify as a "claim" under any definition.

to apply." *United States v. Brockamp*, 519 U.S. 347, 350 (1997) (emphasis in original); *see Young v. United States*, 535 U.S. 43, 49-50 (2002); *Kirkendall v. Dep't of the Army*, 479 F.3d 830, 836-37 (Fed. Cir. 2007) (en banc). The appellants assert that there is no reason in the context of section 605(a) to depart from the presumption that equitable tolling applies to the six-year presentment period in that statute.

For its part, the government contends that section 605(a) is the type of statute that the Supreme Court, in *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008), held is not subject to equitable tolling. In that case, the Court held that 28 U.S.C. § 2501, the statute of limitations governing suits against the United States in the Court of Federal Claims, set forth an "absolute" time limit that could not be extended based on equitable considerations. 128 S. Ct. at 753-54. In so ruling, the Court relied on a long line of prior decisions holding that the Court of Claims' limitations statute could not be equitably tolled. The government asserts that section 605(a) is more akin to section 2501 than to the statute at issue in *Irwin*, and that the time limitation of section 605(a) is therefore not subject to equitable tolling in light of *John R. Sand & Gravel*.

While it is not always easy to determine whether equitable tolling is available under particular statutes of limitations for actions against the government, our precedents and those of the Supreme Court persuade us that equitable tolling applies to the six-year time limitation set forth in section 605(a). Importantly, the *Irwin* presumption applies, which means that we must assume that Congress intended equitable tolling to be available unless there is good reason to believe otherwise. Unlike in the case of section 2501, there is

no long history of case law holding that the time limitation of section 605(a) is absolute; in fact, the issue is one of first impression for this court. Moreover, the time limitation in section 605(a) is of relatively recent vintage. In fact, Congress adopted that time limitation after the decision in *Irwin*, and it is therefore reasonable to construe the statute in light of the general presumption set forth in *Irwin*. *See Young*, 535 U.S. at 49-50 ("[L]imitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute. Congress must be presumed to draft limitations periods in light of this background principle."). The rationale of *John R. Sand & Gravel*, that the Court had long treated the time limitation of section 2501 as not amenable to equitable tolling, and that the Court was not prepared to disregard principles of *stare decisis* with respect to its prior rulings on the same statute, is therefore inapplicable here.

Beyond that, the Supreme Court and this court have identified several factors as instructive in determining whether a particular time limitation is subject to equitable tolling. The Supreme Court discussed those factors in *United States v. Brockamp*, 519 U.S. 347, 350-53 (1997), and this court subsequently summarized the "*Brockamp* factors" as calling for analysis of "the statute's detail, its technical language, its multiple iterations of the limitations period in procedural and substantive form, its explicit inclusion of exceptions, and its underlying subject matter." *Kirkendall*, 479 F.3d at 836-37.

Application of those factors here strongly supports the conclusion that the time limitation of section 605(a) is amenable to equitable tolling. The statutory time limitation of section 605(a) is a simple provision

and does not contain technical language. It provides in the simplest terms that each claim by a contractor "shall be submitted within 6 years of the accrual of the claim." Nor does section 605(a) contain any explicit exceptions to the six-year limitation period on claim submissions by contractors. The Supreme Court has noted that where such express statutory exceptions are present, they provide a basis for inferring that Congress may not have intended other, unspecified exceptions to apply. *Brockamp*, 519 U.S. at 352. The government argues that the statute contains an express exception, in that it provides that the six-year period shall not apply to claims by the government based on contractor claims involving fraud. That exception, however, applies only to claims by the government; the inference that Congress did not intend any implied exceptions to the six-year period for contractors to submit their claims is not as strong as it would be if there were any express exceptions applicable to contractors' claims.

Of course, a central factor in determining whether a particular statute is subject to equitable tolling is the language used to set forth the time limitation. The more emphatic the language, the less likely it is that Congress contemplated that the time limitation would be subject to implied exceptions. The language of the time limitation in section 605(a) is anything but emphatic; it simply states that the claim "shall be submitted" within six years. That formulation is less pointed than the language at issue in *Kirkendall*, where the two statutes at issue provided that a complaint "must be filed within 60 days" and that an appeal shall be filed in accordance with prescribed procedures, but "in no event may any such appeal be brought" more than 15 days after receipt of notification of an administrative denial. Despite that seemingly

preclusive statutory language, this court concluded that the *Irwin* presumption had not been overcome as to either limitations period. Accordingly, with regard to the language of the limitations period, the availability of equitable tolling in this case would seem to follow *a fortiori* from the court's analysis in *Kirkendall*.[6]

In sum, while we agree with the government that class action tolling does not apply to the claims at issue in these cases, we do not agree that the limitations period in section 605(a) is absolute and not subject to equitable tolling. We remand for a determination as to whether, under the circumstances of these cases, the limitation period should be tolled.

No costs.

AFFIRMED IN PART, REVERSED IN PART, and REMANDED.

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[6] Section 605(a) is in the nature of a statute of limitations, not a statute that governs the timing of review. The Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007), and the pending en banc proceeding in *Henderson v. Shinseki*, No. 2009-7006, therefore do not control the disposition of the equitable tolling issue in this case.

APPENDIX B

CBCA
Civilian Board of Contract Appeals

MOTION TO DISMISS GRANTED AS TO CBCA 190-ISDA AND CBCA 289-ISDA THROUGH 293-ISDA AND DENIED AS TO CBCA 294-ISDA THROUGH 297-ISDA: July 28, 2008

CBCA 190-ISDA, CBCA 289-ISDA, CBCA 290-ISDA, CBCA 291-ISDA, CBCA 292-ISDA, CBCA 293-ISDA, CBCA 294-ISDA, CBCA 295-ISDA, CBCA 296-ISDA, CBCA 297-ISDA

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
Appellant,

v.

DEPARTMENT OF HEALTH AND HUMAN SERVICES,
Respondent.

Lloyd Benton Miller and Donald J. Simon of Sonosky, Chambers, Sachse, Miller & Munson, LLP, Anchorage, AK, counsel for Appellant.

Sean Dooley, Office of the General Counsel, Department of Health and Human Services, Rockville, MD, counsel for Respondent.

Before Board Judges HYATT, DeGRAFF, and STEEL.

STEEL, *Board Judge*.

For all the years at issue in these appeals, the Arctic Slope Native Association, Ltd. (ASNA) provided health care services to its members under self-determination

contracts or compacts with the Department of Health and Human Services (HHS) Indian Health Service (IHS), pursuant to the Indian Self-Determination and Education Assistance Act (ISDA or Act), Pub. L. No. 93-638, codified as amended at 25 U.S.C. §§ 450, *et seq.* (2000). ASNA seeks additional amounts of indirect contract support cost (CSC) funding from IHS under ISDA contracts and compacts for fiscal years (FYs) 1996 through 2000. IHS moves to dismiss the appeals.

Background

In 1975, Congress enacted the ISDA to encourage Indian self-government by allowing the transfer of certain federal programs operated by the Federal Government, including health care services programs, to tribal governments and other tribal organizations by way of contracts. The amount of contract funds provided to the tribes was the same as the amount IHS would have provided if it had continued to operate the programs. This amount is known as the "Secretarial amount" or "tribal shares." 25 U.S.C. § 450j-l(a). The Secretarial amount, however, included only the funds IHS would have provided directly to operate the programs. It did not include funds for additional administrative costs the tribes incurred in running the programs, but which IHS would not have incurred, such as the cost of annual financial audits, liability insurance, personnel systems, and financial management and procurement systems. S. Rep. No. 100-274, at 8-9 (1987).

In 1988, Congress amended the ISDA to authorize IHS to negotiate additional instruments, self-governance "compacts," with a selected number of tribes. Pub. L. No. 100-472, tit. II, § 201(a), (b)(1), 102 Stat. 2288, 2289 (1988); *see* 25 U.S.C. § 450f note (repealed by Pub. L. No. 106-260, § 10, 114 Stat. 711, 734 (2000)).

Under this more flexible Tribal Self-Governance Demonstration Project, the selected tribes were given the option of entering into either contracts or compacts[1] with IHS to perform certain programs, functions, services, or activities (PFSAs) which IHS had operated for Indian tribes and their members. If a tribe and IHS entered into a compact, they also entered into annual funding agreements (AFAs).

The 1988 amendments also provided for funding for the additional administrative costs which tribes incurred in running health services programs. The statute as amended provides that there shall be added to the Secretarial amount contract support costs "which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management." 25 U.S.C. § 450j-l(a)(2). These amounts are for "costs which normally are not carried on by the respective Secretary in his direct operation of the program; or . . . are provided by the Secretary in support of the contracted program from resources other than those under contract." *Id.*

There are three categories of CSC: start-up costs, indirect costs (IDC), and direct costs. Start-up costs are one-time costs necessary to plan, prepare for, and assume operation of a new or expanded PFSA, such as the start-up costs for a new clinic. Indirect costs are those costs incurred for a common or joint purpose, but benefiting more than one PFSA, such as administrative and overhead costs. Direct CSC are expenses which are directly attributable to a certain

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[1] For the purposes of this decision, there are no significant differences between contracts and compacts.

PFSA but which are not captured in either the Secretarial amount or indirect costs, such as workers' compensation insurance, which the Secretary would not have incurred if the agency were operating the program. 25 U.S.C. § 450j-1(a).

The provision of funds for CSC is "subject to the availability of appropriations," notwithstanding any other provision in the ISDA, and IHS is not required to reduce funding for one tribe to make funds available to another tribe or tribal organization. 25 U.S.C. § 450j-1(b).

From one fiscal year to the next, IHS cannot reduce the Secretarial amount and the CSC it provides except pursuant to:

> (A) a reduction in appropriations from the previous fiscal year for the program or function to be contracted;
>
> (B) a directive in the statement of the managers accompanying a conference report on an appropriation bill or continuing resolution;
>
> (C) a tribal authorization;
>
> (D) a change in the amount of pass-through funds needed under a contract; or
>
> (E) completion of a contracted project activity or program.

25 U.S.C. § 450j-l(b)(2).

IHS is required to prepare annual reports for Congress regarding the implementation of the ISDA. Among other things, these reports include an accounting of any deficiency in the funds needed to provide contractors with CSC. 25 U.S.C. § 450j-l(c). The reports which set out the deficiencies in funds

needed to provide CSC are known as "shortfall reports." 25 U.S.C. § 450j-1(c), (d).

For FYs 1996 through 1998, Congress set aside $7.5 million of IHS's appropriated funds into the Indian Self-Determination (ISD) fund which were to be used for the transitional costs of new or expanded tribal programs. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321, 1321-189 (1996); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, 110 Stat. 3009, 3009-12 (1996); Department of the Interior and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-83, 111 Stat. 1543, 1582 (1997). In connection with the ISD fund, IHS developed a policy for funding CSC for new or expanded programs. IHS established a priority list, called the "queue," and funded CSC for new or expanded programs on a first-come, first-served basis, as determined by the date on which IHS received a tribe's request for funding. *See, e.g.*, IHS Circular No. 96-04, § 4.A(4)(a)(ii). Thus, IHS would fund the first request it received for funding CSC for a new or expanded program, then it would fund the next request it received, and it would continue funding CSC requests until the ISD funds were exhausted for a fiscal year. Requests not funded during one fiscal year moved up the queue to be paid when the next fiscal year's funds were distributed. Appeal File, Exhibit 4-19, Indian Self-Determination Memorandum (ISDM) 92-2 ¶ 4-C(1), at 4.

One of the 1988 amendments to the ISDA provided that the Contract Disputes Act (CDA) "shall apply to self-determination contracts." 25 U.S.C. § 450m-1(d). In 1994, Congress amended the Contract Disputes Act to include a six-year time limit for presenting a

claim to the contracting officer (often an awarding official in the ISDA context):

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision . . . . Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. The preceding sentence does not apply to a claim by the government against a contractor that is based on a claim by the contractor involving fraud.

41 U.S.C. § 605(a).

Findings of Fact

In January 1996, ASNA began operating the Samuel Simmonds Memorial Hospital and associated programs, functions, and services in Barrow, Alaska, under contract 243-96-6025 with IHS. The "Alaska Tribal Health Compact between Certain Alaska Native Tribes and the United States of America" (ATHC) and related negotiated AFAs authorized thirteen Alaskan tribes to operate health care programs. From October 1, 1997, to the present, ASNA has operated the Barrow Service Unit as a member of the ATHC. Complaint ¶ 6.

On September 30, 2005 ASNA submitted and the awarding official received claims for each of the fiscal years 1996 through 2000 for (1) additional direct and indirect administrative CSC, as confirmed in IHS's annual CSC shortfall and related queue reports, and (2) additional indirect CSCs calculated in accordance with the decision in *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455 (10th Cir. 1997). Complaint ¶ 15.

The amounts claimed for each fiscal year, based on the shortfall report and *Ramah* recalculations, are $2,301,631 for FY 1996, $1,568,828 for FY 1997, $1,008,622 for FY 1998, $2,028,723 for FY 1999, and $621,530 for FY 2000, for a total of $7,529,334.

The awarding official did not issue decisions on these claims. They are therefore deemed denied. 41 U.S.C. § 605(c)(5). Appeals were filed with the Department of the Interior Board of Contract Appeals on August 23, 2006, and docketed as cases IBCA 4794-4803/2006. On January 6, 2007, the Department of the Interior Board of Contract Appeals was merged with other civilian agency boards into the Civilian Board of Contract Appeals (CBCA), where the cases were docketed as described below. Pub. L. No. 109-163, § 847, 119 Stat. 3136 (2006).

Discussion

In their briefs, the parties make a great many arguments, all of which we carefully considered. Due to the manner in which we resolve the issues before us, it is not necessary for us to address each of the arguments they raised in order to resolve the motion to dismiss. As explained below, we lack subject matter jurisdiction to consider the FY 1996, FY 1997, and FY 1998 claims. We possess subject matter jurisdiction to consider the FY 1999 and FY 2000 claims and we cannot dismiss them for failure to state a claim upon which relief can be granted. Therefore, we grant the motion to dismiss in part.

FY 1996 - FY 1998 (CBCA 190-ISDA and 289-ISDA - 293-ISDA)

IHS moves to dismiss the FY 1996 through FY 1998 claims for lack of subject matter jurisdiction because ASNA failed to submit the claims to the

awarding official within six years after they accrued, as required by section 605(a) of the CDA. Respondent's Motion to Dismiss at 8-12. In resolving IHS's motion, we assume all well-pled factual allegations are true and find all reasonable inferences in favor of the non-moving party. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (stating that decisions on such motions to dismiss rest "on the assumption that all the allegations in the complaint are true"); *Leider v. United States*, 301 F.3d 1290, 1295 (Fed. Cir. 2002); *Gould Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991); *Kawa v. United States*, 77 Fed. Cl. 294, 298 (2007); *Barth v. United States*, 28 Fed. Cl. 512, 514 (1993).

The FY 1996 claims accrued on the last day of the fiscal year, which was September 30, 1996, since appellant could expect no further payments for the fiscal year after this date. Similarly, the FY 1997 claims accrued on September 30, 1997, and the FY 1998 claims accrued on September 30, 1998. ASNA submitted its claims for these three fiscal years to the awarding official on September 30, 2005. ASNA contends the six-year time limit was met, because the time limit was either equitably or legally tolled. Memorandum in Opposition to Respondent's Motion to Dismiss at 27-33.

Tolling, whether equitable or legal, is a concept which applies to statutes of limitation. If a court (or a board) possesses jurisdiction to consider a claim, the claim must be filed before the limitations period expires or else it becomes unenforceable. A time limit for filing suit can be suspended, in effect, based upon equitable considerations, *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), or based upon legal considerations, *Stone Container Corp. v. United*

States, 229 F.3d 1345, 1354 (Fed. Cir. 2000). If the applicable statute is tolled for a sufficient period, the time limit for filing suit is met.

Section 605(a) does not contain a statute of limitations which imposes a time limit for filing suit. Rather, it imposes a time limit which this Board's precedent establishes is a prerequisite to our jurisdiction. *Greenlee Construction, Inc. v. General Services Administration*, CBCA 416, 07-1 BCA ¶ 33,514; *accord*, *Gray Personnel, Inc.*, ASBCA 54652, 06-2 BCA ¶ 33,378; *see also Pueblo of Zuni v. United States*, 467 F. Supp. 2d 1099 (D.N.M. 2006). As *Gray Personnel* explained:

> Under the CDA, there are two prerequisites to an appeal to the Board or to the United States Court of Federal Claims:
>
> > Those prerequisites are (1) that the contractor must have submitted a proper CDA claim to the contracting officer requesting a decision, . . . [41 U.S.C.] § 605(a), and (2) that the contracting officer must either have issued a decision on the claim, . . . § 609(a), or have failed to issue a final decision within the required time period, . . . § 605(c)(5).
>
> *England v. Sherman R. Smoot Corp.*, 388 F.3d 844, 852 (Fed. Cir. 2004). If a contractor has not submitted a proper claim, the contracting officer does not have the authority to issue a decision:
>
> > The Act . . . denies the contracting officer the authority to issue a decision at the instance of a contractor until a contract "claim" in writing has been properly submitted to him for a decision. § 605(a). Absent this "claim", no "decision" is possible—and, hence, no basis for jurisdiction . . . .

> *Paragon Energy Corp. v. United States*, 645 F.2d 966, 971 (Ct. Cl. 1981). Thus, "[i]t is well established that without . . . a formal claim and final decision by the contracting officer, there can be no appeal . . . under the CDA. It is a jurisdictional requirement." *Milmark Services, Inc. v. United States*, 231 Ct. Cl. 954, 956 (1982).
>
> Section 605(a) as implemented by FAR subpart 33.2, Disputes and Appeals, is the key provision in determining whether there is a proper or formal claim for purposes of the CDA. *See, e.g., Reflectone, Inc. v. Dalton*, 60 F.3d 1572, 1575 (Fed. Cir. 1995) (en banc) (definition of a claim); *Transamerica Insurance Corp. v. United States*, 973 F.2d 1572, 1576 (Fed. Cir. 1992) (requirement that a claim be submitted for a decision). [The Federal Acquisition Streamlining Act] added the six-year requirement to this key provision, rather than, for example, to 41 U.S.C. §§ 606 or 609, establishing filing periods at the boards and the United States Court of Federal Claims. We conclude, in view of the placement of the six-year provision in § 605(a), that the requirement that a claim be submitted within six years after its accrual, like the other requirements in that section, is jurisdictional. *Accord Axion Corp. v. United States*, 68 Fed. Cl. 468, 480 (2005).

Gray Personnel, Inc., 06-2 BCA at 165,474-75; *cf. John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008).

ASNA's failure to submit its FY 1996 through FY 1998 claims to the awarding official within six years after they accrued, as required by section 605(a) of the CDA, deprived this Board of jurisdiction to consider the claims. We cannot suspend the running

of the six-year time limit any more than we could suspend the requirements, also found in section 605, that a claim must be submitted to the contracting officer, that a claim must be submitted in writing, and that a claim in excess of $100,000 must be certified. In the absence of a claim which meets all the requirements of section 605, we lack jurisdiction to consider an appeal.

We grant the motion to dismiss the FY 1996, FY 1997, and FY 1998 claims for lack of subject matter jurisdiction because ASNA failed to submit these claims to the awarding official within six years after they accrued, as required by section 605(a) of the CDA.

FY 1999 (CBCA 294-ISDA and 295-ISDA)

The FY 1999 claims accrued on the last day of the fiscal year, which was September 30, 1999. ASNA submitted these claims to the awarding official on September 30, 2005. We have jurisdiction to consider these claims because ASNA submitted them to the awarding official within six years after they accrued, as required by section 605(a) of the CDA. IHS argues that ASNA fails to state a claim upon which relief can be granted because in FY 1999, Congress limited the amount of money which IHS had available to fund CSC. Respondent's Motion to Dismiss at 12-13.

We agree with IHS that Congress restricted the funds available for CSC in FY 1999. The requirement to fund CSC is subject to the availability of appropriations, notwithstanding any other provisions of the ISDA. 25 U.S.C. § 450j-1(b). Congress restricted IHS's FY 1999 appropriation when it provided "not to exceed $203,781,000 shall be for payments to tribes and tribal organizations for contract or grant support

costs . . . ." Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 328, 112 Stat. 2681, 2681-337 (1998). No separate amount was designated for the Indian Self-Determination Fund for initial and expanded programs. *Id.*

The fact that funds for CSC were restricted in FY 1999 does not, however, mean that ASNA has failed to state a claim upon which relief can be granted. If providing ASNA with additional funding for CSC would have caused IHS to expend more than $203,781,000 for CSC in FY 1999, ASNA had no statutory or contractual right to such additional funding and its claim for additional funding would not be one upon which we could grant relief. *Greenlee County, Arizona v. United States*, 487 F.3d 871 (Fed. Cir. 2007); *Babbitt v. Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999); *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996). If, however, IHS could have provided ASNA with additional funding for CSC without expending more than $203,781,000 for CSC in FY 1999, ASNA might be able to establish it had a statutory or contractual right to such funding up to the amount of the unexpended funds, in which case its claim would be one upon which we could grant relief. We do not know how much of the $203,781,000 IHS expended during FY 1999.

Because we do not know whether providing ASNA with additional funding for CSC would have caused IHS to expend more than $203,781,000 for CSC for FY 1999, we deny the motion to dismiss the FY 1999 claim for failure to state a claim upon which relief can be granted.

FY 2000 (CBCA 296-ISDA and 297-ISDA)

The FY 2000 claims accrued on the last day of the fiscal year, which was September 30, 2000. ASNA submitted these claims to the awarding official on September 30, 2005. We have jurisdiction to consider these claims because ASNA submitted them to the awarding official within six years after they accrued, as required by section 605(a) of the CDA. IHS argues that ASNA fails to state a claim upon which relief can be granted because in FY 2000, Congress limited the amount of money which IHS had available to fund CSC. Respondent's Motion to Dismiss at 12-13.

We agree with IHS that Congress restricted the funds available for CSC in FY 2000, for the same reason we agree with IHS that Congress restricted the funds available for CSC in FY 1999. Congress restricted IHS's FY 2000 appropriation when it provided "not to exceed $228,781,000 shall be for payments to tribes and tribal organizations for contract or grant support costs . . . ." Consolidated Appropriations Act, 2000, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-182 (1999).

The fact that funds for CSC were restricted in FY 2000 does not, however, mean that ASNA has failed to state a claim upon which relief can be granted. If providing ASNA with additional funding for CSC would have caused IHS to expend more than $228,781,000 for CSC in FY 2000, ASNA had no statutory or contractual right to such additional funding and its claim for additional funding would not be one upon which we could grant relief. *Greenlee County, Arizona; Oglala Sioux Tribal Public Safety Department; Ramah Navajo School Board, Inc.* If, however, IHS could have provided ASNA with additional funding for CSC without expending more than

$228,781,000 for CSC in FY 2000, ASNA might be able to establish it had a statutory or contractual right to such funding up to the amount of the unexpended funds, in which case its claim would be one upon which we could grant relief. We do not know how much of the $228,781,000 IHS expended during FY 2000.

Because we do not know whether providing ASNA with additional funding for CSC would have caused IHS to expend more than $228,781,000 for CSC for FY 2000, we deny the motion to dismiss the FY 2000 claim for failure to state a claim upon which relief can be granted.

Decision

The motion to dismiss is GRANTED as to CBCA 190-ISDA and 289-ISDA through 293-ISDA. The motion to dismiss is DENIED as to CBCA 294-ISDA through 297-ISDA.

CANDIDA S. STEEL
Board Judge

We Concur:
CATHERINE B. HYATT
Board Judge

MARTHA H. DeGRAFF
Board Judge

APPENDIX C

NOTE: This order is nonprecedential.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2008-1532

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
Appellant,

v.

KATHLEEN SEBELIUS,
SECRETARY OF HEALTH AND HUMAN SERVICES,
Appellee.

Appeal from the Civilian Board of Contract Appeals in case nos. 190-ISDA and 289-ISDA through 293-ISDA, Administrative Judge Candida S. Steel.

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the Appellant, and a response thereto having been invited by the court and filed by the Appellee, and the petition for rehearing and response, having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on March 17, 2010.

FOR THE COURT,

/s/ Jan Horbaly
Jan Horbaly
Clerk

Dated: 03/10/2010

cc: Lloyd B. Miller
Sameer Yerawadekar
Michael P. Gross

APPENDIX D

FEDERAL STATUTES

25 U.S.C. § 450m-1. Contract disputes and claims

(a) [Civil actions; concurrent jurisdiction; relief]*

The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this subchapter and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this subchapter. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this subchapter or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this subchapter or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 450f(a)(2) of this title or to compel the Secretary to award and fund an approved self-determination contract).

* * * *

(d) [Application of Contract Disputes Act]*

The Contract Disputes Act (Public Law 95-563, Act of November 1, 1978; 92 Stat. 2383, as amended) [41 U.S.C. 601 et seq.] shall apply to self-determination

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* Bracketed headings added by codifiers.

contracts, except that all administrative appeals relating to such contracts shall be heard by the Interior Board of Contract Appeals established pursuant to section 8 of such Act (41 U.S.C. 607).

* * * *

41 U.S.C. § 605. Decision by Contracting Officer

(a) Contractor claims [excerpt]

All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision. . . . Each claim by a contractor against the government relating to a contract and each claim by the government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim. . . .

* * * *

(b) Review; performance of contract pending appeal

The contracting officer's decision on the claim shall be final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced as authorized by this chapter. Nothing in this chapter shall prohibit executive agencies from including a clause in government contracts requiring that pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

* * * *

Supreme Court, U.S.
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No. 09-1172

In the Supreme Court of the United States

ARCTIC SLOPE NATIVE ASSOCIATION, LTD.,
PETITIONER

v.

KATHLEEN SEBELIUS, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the filing of a putative class action involving claims under the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.*, tolled the CDA's requirement that a federal contractor asserting a claim against the government for breach of contract present that claim to a contracting officer within six years of the claim's accrual, when the failure to comply with the presentment requirement would have prevented such a claim from being litigated in the class action if a class had been certified.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 583 F.3d 785. The opinion of the Civilian Board of Contract Appeals (Pet. App. 27a-40a) is reported at 08-2 B.C.A. (CCH) ¶ 33,923.

JURISDICTION

The judgment of the court of appeals was entered on September 29, 2009. A petition for rehearing was denied on March 10, 2010 (Pet. App. 41a-42a). The petition for a writ of certiorari was filed on March 26, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 605 of Title 41 of the United States Code provides as follows:

> All claims by a contractor against the government relating to a contract shall be in writing and shall be submitted to the contracting officer for a decision[.] * * * Each claim by a contractor against the government relating to a contract * * * shall be submitted within 6 years after the accrual of the claim.

41 U.S.C. 605(a).

STATEMENT

1. a. Petitioner is a nonprofit organization that provides health-care services to members of Indian Tribes and Alaska Natives under contracts with the Indian Health Service (IHS). Pet. App. 2a; Pet. ii. The contracts are authorized by the Indian Self-Determination and Education Assistance Act (ISDA), 25 U.S.C. 450 *et seq.*, which was enacted to promote tribal autonomy by permitting Tribes to manage federally funded services previously administered by the federal government. Pet. App. 2a-3a. Responsibility for the provision of such services is transferred to participating Tribes through self-determination contracts. *Id.* at 3a. Although the ISDA requires the federal government to provide self-determination contractors with the same amount of funding that the federal agency would have expended for the tribal programs if the government had continued to administer them, 25 U.S.C. 450j-1(a)(1), the ISDA did not originally require the federal government to pay an additional amount to cover the administrative costs incurred by Tribes to operate the programs. In 1988, Congress amended the ISDA to require the government

to provide contractors with funds to cover such costs. See Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285.

The 1988 amendments to the ISDA also provided that disputes regarding the performance of self-determination contracts are governed by the Contract Disputes Act of 1978 (CDA), 41 U.S.C. 601 *et seq.* Pet. App. 4a; 25 U.S.C. 450m-1(d). In 1994, Congress amended the CDA to require that any contract claim against the government must be presented to a contracting officer within six years after the claim accrues. 41 U.S.C. 605(a); Pet. App. 31a-32a. If a contracting officer denies a contract claim or does not act on it within a specified period, a self-determination contractor may appeal to the Civilian Board of Contract Appeals, see 41 U.S.C. 606, or to the Court of Federal Claims, see 41 U.S.C. 609(a)(1). Pet. App. 4a. The ISDA also permits a self-determination contractor to appeal an adverse decision from a contracting officer by filing suit in federal district court. See 25 U.S.C. 450m-1(a); Pet. App. 4a.

b. After the 1988 amendments to the ISDA took effect, various tribal entities filed several putative class actions (two of which are relevant to this case), alleging that the federal government was not meeting its obligation to provide funds to cover administrative costs associated with implementing self-determination contracts. Pet. App. 4a-5a. The first relevant putative class action ultimately resulted in a decision by this Court holding that the federal government could not avoid its contractual promise to pay administrative support costs by asserting that Congress had failed to appropriate sufficient funds specifically to cover those costs when Congress had appropriated sufficient unrestricted funds to

pay those costs. See *Cherokee Nation* v. *Leavitt*, 543 U.S. 631, 636-647 (2005); Pet. App. 5a. The second relevant putative class action had been stayed pending this Court's decision in *Cherokee Nation*. Pet. App. 5a-6a. The asserted class in that case consisted of "all tribes and tribal organizations contracting with IHS under the ISDA between the years 1993 to the present." *Id.* at 5a (quoting *Pueblo of Zuni* v. *United States*, 467 F. Supp. 2d 1099, 1105 (D.N.M. 2006)). After the stay was lifted, the district court denied class certification on a number of grounds, including that "the existence of unexhausted claims"—*i.e.*, claims that had not been presented to a contracting officer in writing within six years of accrual as required by the CDA—"within the claims of the putative class [is] a jurisdictional defect, precluding class certification." *Pueblo of Zuni* v. *United States*, 243 F.R.D. 436, 442-443 (D.N.M. 2007).

2. Petitioner Arctic Slope Native Association, Ltd., provides health-care services pursuant to a self-determination contract. Pet. App. 6a. Petitioner claims to have been a member of the putative class in *Pueblo of Zuni*. *Ibid.* On September 30, 2005—after this Court's decision in *Cherokee Nation* and before the district court's denial of class certification in *Pueblo of Zuni*—petitioner filed CDA claims with an IHS contracting officer. *Ibid.* Petitioner alleged that IHS had failed to pay the full amount of the administrative costs of the self-determination contract during fiscal years 1996 through 2000. *Ibid.*

At issue in the petition for a writ of certiorari are the claims for fiscal years 1996 through 1998, on which petitioner obtained no relief from the contracting officer. Pet. App. 7a, 33a. Petitioner appealed to the Civilian Board of Contract Appeals, which held that it lacked

jurisdiction to consider those claims because petitioner had not submitted them to a contracting officer within six years of their accrual, as required by the CDA. *Id.* at 7a; 41 U.S.C. 605(a). The Board rejected petitioner's argument that, because petitioner was a putative member of the class in *Pueblo of Zuni*, the six-year limitations period for filing its administrative claims had been tolled until the district court denied class certification in that case. Pet. App. 7a.

3. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 1a-26a.

a. The court of appeals held that the CDA's six-year period for presenting a claim to a contracting officer was not subject to class-action tolling under Federal Rule of Civil Procedure 23. Pet. App. 9a-22a. The court of appeals acknowledged this Court's holding in *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974), that the filing of a putative class action tolls a statutory limitations period for individual claims by members of the class until class certification is denied. Pet. App. 9a-12a. The court explained, however, that such tolling is available only to "asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *Id.* at 9a (citation omitted). With respect to petitioner's claims regarding fiscal years 1996 through 1998, the court found that petitioner's failure to comply with the CDA's timely-presentment requirement would have rendered those claims ineligible for inclusion in the *Pueblo of Zuni* class action if a class had been certified in that case. *Id.* at 12a-18a. The court therefore concluded that the limitations periods applicable to those claims were not tolled by the filing of the *Pueblo of Zuni* class action. *Id.* at 18a-22a.

b. The court of appeals held that the six-year period for presenting claims to a contracting officer was subject to equitable (as opposed to class-action) tolling. Pet. App. 22a-26a. The court remanded the case to the Board for a determination of "whether, under the circumstances of these cases, the limitation period should be tolled." *Id.* at 26a.[1]

ARGUMENT

Petitioner seeks review of the court of appeals' determination that the filing of a class action pursuant to Federal Rule of Civil Procedure 23 does not toll the limitations period for presenting a claim under the Contract Disputes Act to a contracting officer. Further review of that question is not warranted at this time because the case is currently in an interlocutory posture. In any event, the court of appeals' resolution of the question presented is correct and does not conflict with any decision of this Court or any other court of appeals.

1. As an initial matter, review of the question presented is not warranted at this time because this case is in an interlocutory posture. Upon remand to the Civilian Board of Contract Appeals, petitioner will have an opportunity to argue that it is entitled to equitable tolling of the six-year presentment requirement with respect to its claims regarding fiscal years 1996 through 1998. If petitioner prevails on that issue, resolution of

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[1] The United States has not sought review of the portion of the court of appeals' interlocutory decision that held that the CDA's six-year time limit is subject to equitable tolling. The government's decision not to challenge that interlocutory ruling would not preclude the United States from seeking review of any future final order concluding that equitable tolling should in fact apply to petitioner's claims regarding fiscal years 1996 through 1998.

its claim to class-action tolling will have no effect on the outcome of the case. If petitioner is ultimately held not to be entitled to equitable tolling, it will be able to raise the class-action tolling argument—together with any other claims that may arise during subsequent proceedings in this case—in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting the denial of the petition for a writ of certiorari) (expressing preference for review after all proceedings have concluded below); see generally Robert Stern et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002).

2. Petitioner asserts (Pet. 8-9) that the court of appeals' decision conflicts with decisions of the First, Sixth, and Eleventh Circuits. That is incorrect. The Federal Circuit in this case held that the filing of a putative class action does not toll the limitations period for filing an administrative complaint for claims that could not have been litigated in the class action if a class had been certified. Pet. App. 12a-22a. Petitioner identifies no court of appeals decision holding that the applicable limitations period should be tolled in this circumstance. Rather, the decisions on which petitioner relies hold that the filing of a class action tolls a limitations period for filing an administrative complaint when a litigant's failure to file or exhaust such a claim would *not* have precluded the resolution of the claim in the class action if a class had later been certified.

The Sixth and Eleventh Circuit decisions on which petitioner relies both held that the filing of a putative class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, tolls the time for individual

members of the asserted class to file an administrative complaint with the Equal Employment Opportunity Commission (EEOC). See *Griffin* v. *Singletary*, 17 F.3d 356, 359-361 (11th Cir. 1994), cert. denied, 513 U.S. 1077 (1995); *Andrews* v. *Orr*, 851 F.2d 146, 148-149 (6th Cir. 1988). This Court has held, however, that the filing of a claim with the EEOC is not a jurisdictional prerequisite to filing a Title VII suit in district court, and that an individual plaintiff's failure to file such an administrative claim does not preclude that individual from inclusion in a Title VII class action. See *Zipes* v. *TWA, Inc.*, 455 U.S. 385, 392-398 (1982); see also *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n.8 (1975) (recognizing that claims may be sustained on "a class basis under Title VII without exhaustion of administrative procedures by the unnamed class members"). The same is not true of claims under the CDA.

The ISDA and the CDA together require that a self-determination contractor present its contract dispute to a contracting officer in writing within six years after the claim accrues. 25 U.S.C. 450m-1(d); 41 U.S.C. 605(a). Compliance with the six-year presentment requirement is a jurisdictional prerequisite to pursuing a CDA claim in the Court of Federal Claims or a district court, or before the Civilian Board of Contract Appeals. Because petitioner did not satisfy that requirement with respect to the claims at issue, it would not have been eligible for inclusion in the *Pueblo of Zuni* class if a class had been certified in that case. See *Pueblo of Zuni* v. *United States*, 243 F.R.D. 436, 442-443 (D.N.M. 2007). Indeed, the petition for a writ of certiorari does not contend that petitioner's claims could have been litigated in *Pueblo of Zuni* if the district court had certified a class. The court of appeals decisions applying class-action tolling rules to

Title VII's EEOC filing requirement therefore do not conflict with the Federal Circuit's decision in this case.

The court of appeals' decision in this case likewise does not conflict with the First Circuit decision on which petitioner relies. In *McDonald* v. *Secretary of Health & Human Services*, 834 F.2d 1085, 1088-1092 (1987), the First Circuit held that the district court in that case had the authority to revive timely-filed administrative complaints that had not been timely exhausted during the pendency of a class action in which the claimants were members of the certified class. This case differs from *McDonald* in two important respects.

First, whereas petitioner failed to initiate administrative proceedings in a timely manner by presenting a claim to the contracting officer within six years after the claim accrued, the revived claims in *McDonald* had been timely filed before the initial agency decisionmaker and therefore satisfied the analogous limitations period. Second, the First Circuit in *McDonald* expressly limited its decision to the circumstances of that case, in which the prior course of proceedings had induced the parties to conclude that exhaustion was not required. The First Circuit explained that the parties and the district court had been "entitled to assume that [the court of appeals] did not question the [district] court's jurisdiction over the class members" because the court of appeals had previously ruled on the merits of the class members' claims without finding that the class had been improperly certified. *McDonald*, 834 F.2d at 1091. The court stated that, "[h]owever the need for exhaustion might be viewed as an initial matter, there are special factors leading us to affirm the district court's jurisdiction and judgment at this late stage in the litigation." *Ibid.* Peti-

tioner identifies no analogous "special factors" present in this case.

3. There is also no merit to petitioner's contention (Pet. 10-12) that the court of appeals' decision conflicts with this Court's decisions in *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345 (1983) (*Crown*); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974); and *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974) (*American Pipe*). The Court held in those cases that class-action tolling applies to "all asserted members of the class who would have been parties had the suit been permitted to continue as a class action." *American Pipe*, 414 U.S. at 554; see *Crown*, 462 U.S. at 349 (same); *Eisen*, 417 U.S. at 176 n.13 (citing *American Pipe*). That is consistent with the court of appeals' decision, which held that class-action tolling does not apply to petitioner's claims for fiscal years 1996 through 1998 precisely because those claims could not have been resolved in the *Pueblo of Zuni* class action if the class in that case had been certified. See Pet. App. 12a-22a; see also *id.* at 21a (noting that the rationale of *American Pipe* "would protect any potential class member over whom the court could exercise jurisdiction by class certification, but not parties, such as those who have failed to exhaust mandatory administrative remedies, over whom the court may not exercise jurisdiction"). This Court's decisions therefore do not support petitioner's contention that the time for presenting its claims to a contracting officer was tolled by the pendency of a putative class action in which those claims could not have been litigated.

4. As the court of appeals explained (Pet. App. 18a-19a), the scheme petitioner proposes would make little sense because the tolling petitioner seeks would put it in a better position than if the class in *Pueblo of Zuni* had

been certified. If the class had been certified in 2007, petitioner's claims as to fiscal years 1996 through 1998 could not have been litigated in the class action because petitioner had not satisfied the administrative presentment requirement. There is no reason to allow petitioner to pursue such claims belatedly simply because the class ultimately was not certified.

For similar reasons, petitioner is likewise incorrect in arguing (Pet. 12, 13) that the court of appeals' decision will "foster[] unnecessary litigation and uncertainty" and "defeat[] the very purpose of" the class-action tolling rule. As the court of appeals explained (Pet. App. 9a-10a), that tolling rule obviates the need for putative class members to protect their rights by filing individual complaints that will be rendered superfluous if a class is ultimately certified. That concern is not implicated in the present context, however, since any class action that might have gone forward would have been limited to claims that were timely presented to a contracting officer. Because presentment of petitioner's claims to a contracting officer would not have been a wasteful act even if the court in *Pueblo of Zuni* had certified a class, tolling those claims would not serve the purpose that the class-action tolling rule is intended to achieve.

On the contrary, applying class-action tolling here would undermine judicial efficiency. Because individual CDA claimants must present their claims to contracting officers before they can participate in class actions, tolling the presentment deadline would unnecessarily delay the filing of the administrative claims without avoiding the presentment requirement. And as the court of appeals noted, presentment in the circumstances of petitioner's case would have served the "useful function of

apprising the government of the amount that is potentially at issue in the class action suit, which promotes the notice function that is part of the justification for the presentment requirement in the first place." Pet. App. 21a. Notice to the federal government of damages claims is especially important in CDA cases because the CDA grants "agencies to which claims are presented * * * broad settlement authority," which can prevent litigation from occurring at all. *Id.* at 16a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF FOR PETITIONER

The Brief in Opposition only serves to confirm that certiorari should be granted. First, three circuit court decisions stand in direct conflict with the decision below, and the government's attempt to distinguish these cases is entirely without merit. Second, the government does not even try to defend the Federal Circuit's perplexing, circular and self-contradicting logic; instead, the government suggests that it too might seek certiorari after a remand. And third, the government hardly disputes that this case fits squarely within the set of cases in which interlocutory review is necessary.

1. Despite its effort, the government cannot obscure the simple and unmistakable conflict be-

tween the Federal Circuit's decision and the holdings of the First, Sixth and Eleventh Circuits.

Contrary to the decision below, the First Circuit applies the class action tolling rule to administrative exhaustion periods, *McDonald* v. *Sec'y of Health & Human Servs.*, 834 F.2d 1085, 1091-92 (1st Cir. 1987); the Sixth Circuit applies the class action tolling rule to "the thirty day limitations period for filing individual administrative complaints," *Andrews* v. *Orr*, 851 F.2d 146, 148-49 (6th Cir. 1988); and the Eleventh Circuit applies the class action tolling rule "'to the filing of administrative claims,'" *Griffin* v. *Singletary*, 17 F.3d 356, 360 (11th Cir. 1994) (quoting *Sharpe* v. *Am. Express Co.*, 689 F. Supp. 294, 300 (S.D.N.Y. 1988)). All three Circuits recognize that "the principles discussed [in *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 353-54 (1983) and *American Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 554 (1974)] are generally applicable" to administrative filing periods, *McDonald*, 834 F.2d at 1092. *See also Griffin*, 17 F.3d at 360 ("'[a]pplying the tolling rule to the filing of administrative claims will have the same salutary effect as exists for the filing of lawsuits'" and "'avoid encouraging all putative class members to file separate claims'") (alteration in original) (quoting *Sharpe*, 689 F. Supp. at 300); *Andrews*, 851 F.2d at 150 ("So long as a class action is pending the employer-agency is on notice of the claims of all putative class members.").

a. In denying the existence of this clear conflict, the government's only answer is to assert a false distinction. The government contends that the claimant in each of the other circuit cases could have been a member of the class had a class been certified, while here Petitioner could not have been. But the only asserted reason why Petitioner could not have

been a member of the class is that Petitioner did not "[c]ompl[y] with the six-year presentment requirement" (Opp. 8). In other words, according to the government, there can be no tolling of the presentment requirement because Petitioner did not satisfy the untolled presentment requirement. That gets the analysis completely backwards. And it only begs the question presented, for if routine class action tolling *does* apply, as all of the other Circuits and district courts to speak to the issue have held, then Petitioner did not fail to comply with the statutory timing requirement.

In the end, the government's analysis is entirely circular: the government contends that timely presentment of Petitioner's claims cannot be tolled because Petitioner could not be a member of the certified class, but Petitioner could not be a member of the certified class because it did not timely present. As the government sees it, tolling the time to present administrative claims is permitted only if the claims have already been timely presented—when tolling is plainly unnecessary. That proposition simply collapses of its own weight; it provides no basis for distinguishing the law of the First, Sixth and Eleventh Circuits, and it effectively reads class action tolling out of the law in government litigation.

b. More to the point, under this Court's precedents the question is not whether Petitioner would have been a member of a class had one been certified, but rather whether Petitioner was "'an asserted member'" of the "'putative class,'" which was ultimately not certified in *Pueblo of Zuni* v. *United States*, No. 01-1046 (D.N.M. filed Sept. 10, 2001). Pet. 6, 10 (quoting *Crown*, 462 U.S. at 353-54 and *American Pipe*, 414 U.S. at 554). Here, Petitioner was a member of the asserted class in *Zuni*, which was

comprised of "'all tribes and tribal organizations contracting with [the Indian Health Service] under the [Indian Self-Determination Act] between the years 1993 to the present'" (J.A. 477). And there is no dispute that Petitioner *did* contract with IHS during the asserted class period (*i.e.*, 1996-1998). The government's argument about Petitioner's class status therefore completely misses the mark.

c. It is no response to say that administrative presentment under § 605(a) of the Contract Disputes Act, 41 U.S.C. §§ 610-613 (CDA), is "jurisdictional," while the administrative filings at issue in two of the other three Circuit cases were not. First, the Federal Circuit expressly "reject[ed]" the government's argument and held that CDA presentment is *not jurisdictional*. Pet. App. 12a. The court below observed that its prior decision in *Stone Container Corp.* v. *United States*, 229 F.3d 1345 (Fed. Cir. 2000) "closes the door" on the argument that section 605(a) "is a 'jurisdictional statute [that is] not subject to judge-made class action tolling.'" Pet. App. 10a (alteration in original). *See also Bowles* v. *Russell*, 551 U.S. 205, 210, 214 (2007) (distinguishing between "jurisdictional rules" for which there can be no "equitable exceptions," and "claims-processing rules").

Second, the premise is wrong because even an indisputably "jurisdictional" statute of limitations, like the deadline to file suit under the Tucker Act, 28 U.S.C. § 1491(a)(1), *see John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130 (2008), is nonetheless subject to class action tolling. *Bright* v. *United States*, 603 F.3d 1273 (Fed. Cir. 2010).

In sum, the government is wrong in its contention that the CDA presentment period is jurisdictional; wrong in its view that only jurisdictional statutes are subject to class action tolling; and wrong in its effort

to distinguish the decisions of the other three Circuits.

d. The government's policy reason for distinguishing between class action tolling of the CDA's presentment period and class action tolling of other administrative filing requirements is equally unavailing. Class action tolling under *American Pipe* and *Crown* is intended to promote efficiency while "'notif[ying] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.'" *Crown*, 462 U.S. at 353.

Here the agency was well aware of all the potential class claims being asserted against it for unpaid contract support costs, even in the absence of formal "presentment" of such claims by each of the asserted class members. Pursuant to a statutory mandate, 25 U.S.C. § 450j-1(c)(2), the government regularly developed annual reports to Congress setting forth "an accounting of any deficiency in funds needed to provide required contract support costs to all contractors," *id.*, identifying each and every contractor that was underpaid and precisely by how much. Particularly in this setting, and as *Crown* notes, 462 U.S. at 353, the filing of a class action complaint easily satisfies the government's asserted interest in some notice (Opp. 11-12). The government's demand for even more notice is, at bottom, an attack on class action tolling in general and a demand for the individualized presentment that the First, Sixth and Eleventh Circuits uniformly reject.

The government also asserts that individualized presentment is compelled by the government's need for an opportunity to explore individualized settlement (Opp. 12), but that too is nothing more than an

attack on class action tolling. Moreover, in both the *Zuni* and *Ramah* class actions, as here and as in *Cherokee Nation* v. *Leavitt*, 543 U.S. 631 (2005), the plaintiffs raised not an individualized claim but a challenge to a categorical agency position, set in concrete in an agency circular, that a statutory exception contained in the Indian Self-Determination Act, 25 U.S.C. §§ 450-450n, excused the agency from paying any additional contract support costs. By its very nature, a claim against an agency circular or regulation is not amenable to individualized settlement by contracting officers. So there exist no compelling policy reasons to support the Federal Circuit's sharp departure from the law of the other Circuits.

2. Turning to the merits, even the government distances itself from the Federal Circuit's reasoning. Most tellingly, the government offers no rationale to explain why Congress would choose to prohibit predictable class action tolling but nonetheless permit discretionary equitable tolling. Both class action tolling and equitable tolling are creatures of congressional intent, *see* Pet. 13 (discussing *Irwin* v. *Dep't of Veterans Affairs*, 498 U.S. 89, 95 (1990) (equitable tolling) and *American Pipe*, 414 U.S. at 557-58) (class tolling)), and there is simply no reason to believe that Congress intended the implausible result reached by the Federal Circuit.

Understandably, the government does not defend this bizarre formulation. Rather, it expressly reserves the right to petition this Court to review the Federal Circuit's decision if it loses the equitable tolling issue on remand. Opp. 6 n.1. The best that can be said, then, is that *no one* defends the logic of the Federal Circuit's split-the-baby resolution of the tolling issues. The Federal Circuit's approach is

based on the fundamentally illogical proposition that the CDA presentment period is, at one and the same time, both jurisdictional and non-jurisdictional. No remand will cure this flawed analysis and the government makes no effort to defend it, providing another compelling reason why the Petition should be granted.

3. The interlocutory posture of this case is no reason to delay review because the decision below is plainly wrong and will immediately generate needless litigation and administrative proceedings.

The government's protestation notwithstanding (Opp. 6-7), "'there is no absolute bar to review of nonfinal judgments.'" Pet. 13-14 (quoting *Mazurek* v. *Armstrong*, 520 U.S. 968, 975-76 (1997) (per curiam)). This Court has intervened when a lower court decision is "'patently incorrect'" and will have "'immediate consequences.'" Pet. 14 (quoting Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 281 (9th ed. 2007)).

The government does not and cannot dispute that this case fits squarely within these criteria. As noted, the government does little to defend the logic of the Federal Circuit's decision and even suggests that it, too, may seek review of the Circuit's decision following remand. Opp. 6 n.1. The decision is illogical, internally inconsistent, and "patently incorrect." Gressman et al., *supra*, at 281.

Moreover, if this Court does not grant review to enforce the mandatory tolling rule, the consequence will be time-consuming, case-by-case, litigation by scores of individual claimants attempting to prove their fact-bound claims for equitable tolling—litigation that could drag on for years. Needless to say, this would burden not just Petitioner and

potentially every other tribal contractor that was unlawfully underpaid under this Court's *Cherokee* decision, but also the Board and the Federal Circuit. Such "immediate consequences" provide ample justification for stepping in now to reconcile the conflicting Circuits' decisions and to correct a fundamental misapplication of this Court's class action jurisprudence.

The burden of deferring review until some later time is exacerbated because virtually all suits against the government (other than Tucker Act litigation) require some sort of administrative exhaustion. *See* Pet. 13-14. By excepting administrative exhaustion from the class action tolling rule, the Federal Circuit's decision severely narrows the availability of class action litigation against the government, directly contrary to *Califano* v. *Yamasaki*, 442 U.S. 682, 700 (1979). As a result, similarly situated parties will be required needlessly to file separate but duplicative administrative proceedings before the Board and other agencies, as well as pursue separate federal court review—negating the very efficiencies the class action mechanism is meant to provide.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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